Supreme Court, U.S.
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No. 92-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CARMEN M. MAIO, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

URSULA P. MOUL
Captain, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332
(202) 767-1562
Counsel of Record

MARY C. YASTISHOCK
Major, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332
(202) 767-1562
Counsel for Petitioner

July 1992

QUESTION PRESENTED

Whether the military judge erred by denying appellant's motion to suppress his confession for lack of adequate corroboration as required by Military Rule of Evidence 304(g), *Opper v. United States*, 348 U.S. 84 (1954) and *Smith v. United States*, 348 U.S. 147 (1954)?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Carmen M. Maio, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on May 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 34 M.J. 215 (C.M.A. 1991) (Appendix A). The United States Air Force Court of Military Review issued an unpublished decision on January 10, 1991 (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 11 May 1992. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a (1989), and 28 U.S.C. § 1259(3) (1989).

STATEMENT OF THE CASE

During the Summer of 1989, Staff Sergeant Ronald R. Brainard worked as an undercover narcotics agent as part of a joint undercover narcotics investigation conducted by the Air Force Office of Special Investigations (OSI) at Mather Air Force Base, California, and civilian authorities from the surrounding communities. Many of Sergeant Brainard's investigative activities centered on Gigi's, a civilian bar, located near Travis Air Force Base, California.

On July 5, 1989, Sergeant Brainard met the appellant at Gigi's. The two played billiards for a while, and then they left for a drive in Sergeant Brainard's car. While on the drive, the appellant and Sergeant Brainard stopped by the side of the road near Travis Air Force Base. Sergeant Brainard showed the appellant a baggie of white powder and told the appellant it was methamphetamine. Actually the powder was not methamphetamine, rather it was a placebo which produced the same nasal irritant effect as methamphetamine but no "high" sensation. Sergeant Brainard placed some of the white powder on the end of a key and gave the key to the appellant. The appellant inhaled the powder through his nose. Sergeant Brainard simulated inhaling some of the white powder. The two talked for a while and then returned to Gigi's.

On July 14, 1989, Sergeant Brainard and the appellant again met at Gigi's. After talking for a while, the two again left in Brainard's car. Sergeant Brainard told the appellant that he had some methamphetamine called "Blue Streak." Sergeant Brainard showed the appellant some white powder in a small baggie, which was again a placebo, and offered to sell it to him for $20.00. The appellant looked at the bag and agreed to buy the powder. Both the appellant and Sergeant Brainard again inhaled some of the powder from the tip of a key. Afterwards, they returned to Gigi's.

On July 27, 1989, AFOSI Special Agent Michael J. Salyards met the appellant at his barracks room and escorted him to the Travis Air Force Base AFOSI office for questioning. After advisement of his rights under Article 31, UCMJ, 10 U.S.C. § 831 (1983), the appellant waived his rights to counsel and to remain silent. He spoke with the AFOSI, and then wrote in his own hand a statement admitted as Prosecution Exhibit 3.

In his statement, the appellant admitted to using methamphetamine approximately 10-12 times since January 1989. He said his uses occurred either in his barracks room during his free time or before going jet skiing at Folsom Lake, but never on duty or before going to work. The appellant indicated that he obtained the drugs from his roommate, Airman Duane Spencer, and that they used methamphetamine together. The appellant said his method of ingestion was to "inhale it." In addition, the appellant admitted to his use and purchase of the placebo methamphetamine from Sergeant Brainard. It appears that at the time of his confession, the appellant did not know that Sergeant Brainard was working undercover.

At trial, the defense moved to suppress the confession because it was not corroborated under Military Rule of Evidence 304(g). Sergeant Brainard testified that the appellant had said that he and his roommate had snorted some methamphetamine in late June 1989 prior to coming on duty. As a result, they had performed an "HSC" (Home Station Check aircraft inspection) in such a timely manner that they were given time off for it. Appellant also told Sergeant Brainard that he and Airman Spencer usually used methamphetamine on weekends prior to going jet skiing. Sergeant Brainard testified that during the investigation, he had observed Airman Spencer snort methamphetamine and placebo methamphetamine off the end of a key. Sergeant Brainard also testified that he was never with both Airman Spencer and the appellant at the same time.

The Court of Military Appeals found the following evidence to be independent of appellant's confession:

1) Direct testimony from undercover agent Sergeant Brainard that *appellant had earlier admitted* all confessed facts to him on July 5, 1989.

2) Direct testimony from undercover agent Sergeant Brainard that he observed *Spencer, appellant's roommate* and putative supplier, produce and use methamphetamine on Jun 2, 1989, at or near "Gigi's."

3) Written statement by Sergeant Brainard that *Spencer admitted* using methamphetamine, in the presence of his roommate, when jet skiing.

4) Direct testimony from undercover agent, Sergeant Brainard, that during the charged period he twice observed appellant readily ingest placebo methamphetamine by snorting it from a key.

United States v. Maio, 34 M.J. 215, 218 (1992) (emphasis added).

REASONS FOR GRANTING THE WRIT

Military Rule of Evidence 304(g) provides:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. . . .

Although there is no Federal Rules of Evidence counterpart to Military Rule of Evidence 304(g), it has long been the standard that an accused cannot be convicted based solely upon an uncorroborated, out-of-court admis-

sion or confession. In *Smith v. United States*, 348 U.S. 147 (1954), this Honorable Court explained that the justification for this requirement recognizes the long history of judicial experience with confessions and the realization that sound law enforcement requires investigation beyond the words of the accused. Confessions may be unreliable because they were involuntarily obtained by use of police coercion or unlawful inducement or voluntarily obtained but reflecting the pressure of the police investigation rather than a clear reflection of the past. Additionally, experience recounts a number of false confessions voluntarily made. 348 U.S. at 153. A conviction may be supported by a confession "as long as there is substantial independent evidence that the offense has been committed." *Id.* at 156.

It is a settled principle in the federal courts that a "conviction must rest upon firmer ground that the uncorroborated admission or confession of the accused." *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963).

> In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tingle or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.

Opper v. United States, 348 U.S. 84, 89-90 (1954).

Appellant's conviction should not be sustained because, apart from his own words, there was no evidence whatever that a crime occurred. The first item of corroboration noted by the Court of Military Appeals, that appellant had earlier admitted the facts confessed, cannot be seen as *independent* corroboration. The second item, that the appellant's *roommate* produced and used methamphetamine, is a purely irrelevant and peripheral matter. There was no evidence presented at trial that the substance was in fact methamphetamine. The third item,

that appellant's *roommate* admitted using methamphetamine with appellant when jet skiing, is contrary to the principle that co-conspirator's hearsay statements may not be admitted against an accused. *Wong Sun v. United States*, 371 U.S. at 491. Finally, that appellant twice used placebo drugs by snorting it from a key in front of the undercover agent, is an attempt to show subsequent drug use as corroboration for a prior use of the same drug. This logic completely destroys the substance of the requirement for *independent* corroboration of the essential facts admitted. There is absolutely no external evidence that a crime was committed, and appellant's confession was improperly used to convict him.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity for this Court to define the limits of the admissibility of confessions when there is no external evidence that a crime was committed.

Respectfully submitted,

URSULA P. MOUL
Captain, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332
(202) 767-1562
Counsel of Record

MARY C. YASTISHOCK
Major, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332
(202) 767-1562
Counsel for Petitioner

July 1992

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 66,667

ACM 28458

UNITED STATES,

Appellee,

v.

CARMEN M. MAIO, JR., Airman First Class U.S. Air Force,

Appellant.

Argued Jan. 7, 1992

Decided May 11, 1992

For Appellant: Captain *Ursula P. Moul* (argued); Colonel *Jeffrey R. Owens* (on brief); Major *Bernard E. Doyle, Jr.*

For Appellee: Captain *James C. Sinwell* (argued); Lieutenant Colonel *Brenda J. Hollis* (on brief).

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a general court-martial composed of a military judge sitting alone at Travis Air Force Base, California, on January 18 and 19, 1990. Pursuant to his pleas of guilty, he was found guilty of attempting to wrongfully use methamphetamine (by consuming placebos) on divers occasions between July 5 and 27, 1989, and attempting to wrongfully possess the same (by acquiring a placebo) on July 14, 1989. Art. 80, Uni-

form Code of Military Justice, 10 USC § 880. In addition, pursuant to his conditional pleas, he was found guilty of wrongfully using methamphetamine on divers occasions between April 1 and July 27, 1989, in violation of Article 112a, UCMJ, 10 USC § 912a. He was sentenced to a bad-conduct discharge, confinement and forfeiture of $400 pay per month for 9 months, and reduction to airman basic. The convening authority approved this sentence, and the Court of Military Review affirmed on January 10, 1991, in an unpublished opinion.

This Court granted review of the following question of law:

> WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION FOR LACK OF ADEQUATE CORROBORATION AS REQUIRED BY MIL.R.EVID. 304(g).

We hold that this record contains more than the slight evidence of corroboration required by Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, for admission of appellant's voluntary confession at this court-martial. *See generally United States v. Yeoman*, 25 MJ 1, 4 (CMA 1987).

Appellant was charged with various drug offenses occurring between January 1 and July 27, 1989. The original specifications state:

> CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 80.
>
> Specification 1: In that [appellant] did, at or near Travis Air Force Base, California, *on divers occasions between on or about 5 July 1989 and on or about 27 July 1989*, attempt to wrongfully use methamphetamine.
>
> Specification 2: In that [appellant] did, at or near Travis Air Force Base, California, *on or about 14*

> *July 1989*, attempt to wrongfully possess some amount of methamphetamine.
>
> CHARGE II: Violation of the UCMJ, Article 112a.
>
> Specification: In that [appellant] did, at or near Travis Air Force Base, California, *on divers occasions, between on or about 1 January 1989 and on or about 27 July 1989*, wrongfully use methamphetamine.

(Emphasis added.)

Appellant, however, admitted during his guilty-plea inquiry that he used actual methamphetamine in his room on only two occasions during the period from April 1 to July 27, 1989. He acknowledged that those uses (the specification of Charge II) were distinct from his use and possession of placebo methamphetamine on July 5 and 27, 1989 (specifications 1 and 2 of Charge I).

Prior to entering his pleas, appellant had moved to suppress his confession of July 27, 1989, on the basis of a lack of corroboration required by Mil.R.Evid. 304(g). This confession states:

> I Carmen M. Maio, have been stationed at Travis since April 1988. Duane Spencer (Spence) has been my roommate since August '88. The first time I had used methamphetamine, crank, was approx. January 1989. *Since Jan 1989 I have used crank approximately 10-12 times. The places at which this occurred were either in my room, bldg. 1346 Rm. A-4, or before going to Folsom Lake to jet ski. I would use crank in my room before going jet skiing, or on my free time always keeping it to myself and not involving others.* The crank was in powder form, and I wo[ul]d inhale it for digestion. I knew it was crank from its distinct smell and it would make me feel like I had drank a pot of coffe. *On the occasions I had used crank I had gotten it through Spence or was turned on by him, occasionally using with him*

(10-12 times). Most of the time I would get it from someone else, neither one of us actually being dealers. I think Spence would get the crank at Gigi's from civilians. I don't think Spence ever bought crank from military members, and I don't know of any military members who sell drugs. Around the middle of July '89 I bought $20.00 worth of what I thought was crank from Ron, a guy I met at Gigi's. I used about half of what I bought and realizing that it was in fact not crank, I did not use what was left. Around the beginning of July 89, I used about half a line of what I thought was crank, being turned on from Ron. This happened in Ron's car somewhere in Fairfield. I never used crank on duty or before going to work. It was for my personal use and I had never dealt to anyone nor witnessed Spence to deal. The reasons I would use crank is because it made me feel productive, gave an energy boost. I do not want what has happened to be detrimental to my career. Realizing this I will never use it again. I do like the military and wish to be a part of the military team. I will try to help in any way possible.

s/Carmen M. Maio

(Emphasis added.)

Evidence was taken at a hearing prior to pleas on admissibility of this confession, including testimony by Special Agent Salyards, the police officer who obtained it on July 27, 1989. Sergeant Brainard, an undercover agent for the security police, also testified *inter alia* concerning additional admissions made to him by appellant on July 5, 1989, as well as other matters observed during his undercover operation against appellant and his roommate during the charged period. (*See* appendix.) Finally, Sergeant Keith, appellant's supervisor, testified about appellant's work schedule and duties during this period.

The military judge ruled that the challenged confession was sufficiently corroborated to be admitted at this court-martial. He also articulated for the record his reasons for this ruling. The Court of Military Review also held that the confession was properly corroborated and articulated its corroboration rationale. We now affirm the court below.

Our starting point in resolving the granted issue is the voluntary confession written and signed by appellant and given to Agent Salyards on July 27, 1989. In this confession, appellant essentially admitted that he had intentionally and knowingly used methamphetamines (crank) approximately 10 to 12 times since January 1, 1989. He further stated that he normally inhaled these drugs in powder form in private but also occasionally in the presence of his roommate, Duane Spencer. He particularly noted that such use had occurred before going jet skiing. Finally, he identified Spencer as his drug supplier whose source he further denoted as a bar named Gigi's.

Clearly, this confession established all the elements of unlawful drug use in violation of Article 112a. *See* para. 37(b)(2), Part IV, Manual, *supra*. Moreover, appellant at no time claimed his confession was involuntary or that he was not properly advised of his rights prior to making it. *See United States v. Yeoman*, *supra* at 4. *See* Mil.R.Evid. 304(a) and (c)(3). Instead, he rested his suppression motion on Mil.R.Evid. 304(g) and contended his confession was not adequately corroborated.

Mil.R.Evid. 304(g) states:

> (g) *Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.* Other uncorroborated confes-

sions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. *The independent evidence need raise only an inference of the truth of the essential facts admitted.* The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

(Emphasis added.)

This Court has considered the above Manual provision on several occasions. We have consistently held that it does not require independent evidence of the "*corpus delicti*" of the confessed offense (see 7 J. Wigmore, *Evidence* § 2072 (Chadbourn rev.1978) for a discussion of that

term) but, instead, that it requires independent evidence which establishes the truthworthiness of the confession. *United States v. Rounds*, 30 MJ 76, 80-81(CMA), *cert. denied*, —— U.S. ——, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990); *United States v. Melvin*, 26 MJ 145 (CMA 1988); *United States v. Yeoman*, *supra*. These holdings are consistent with Supreme Court precedent and with practice in Federal civilian courts such that it can be realistically said in the Federal sector that the "corpus delicti" corroboration rule no longer exists. *United States v. Kerley*, 838 F.2d 932, 939-40 (7th Cir.1988). *See generally* C. Wright, *Federal Practice and Procedure: Criminal 2d* § 414 at 516 (1982); 7 J. Wigmore, *Evidence* § 2071 at 511-16. The bottom line is that the corroborating evidence must raise only an inference of truth[1] as to "the essential facts admitted" in the confession. *See State v. Harris*, 215 Conn. 189, 575 A.2d 223, 226-27 (1990).

We note that the following evidence independent of appellant's confession was adduced at the suppression hearing:

> (1) Direct testimony from undercover agent Sergeant Brainard that appellant had earlier admitted all confessed facts to him on July 5, 1989.
>
> (2) Direct testimony from undercover agent Sergeant Brainard that he observed Spencer, appellant's roommate and putative supplier, produce and use methamphetamine on June 2, 1989, at or near "Gigi's."

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[1] We have characterized the quantum of corroboration evidence required by Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, as "slight" (*United States v. Yeoman*, 25 MJ 1, 4 (CMA 1987)), or "very slight" (*United States v. Melvin*, 26 MP 145, 146 (CMA 1988)). This characterization reflects our understanding that it need not establish beyond a reasonable doubt or by a preponderance of the evidence the truth of the essential facts stated in the confession. *See* S. Saltzburg, L. Schinasi and D. Schlueter *Military Rules of Evidence Manual*, Editorial Comment on Rule 304(g) at 166 (3d ed. 1991).

(3) Written statement by Sergeant Brainard that Spencer admitted using methamphetamine, in the presence of his roommate, whe njet skiing.

(4) Direct testimony from undercover agent, Sergeant Brainard, that during the charged period he twice observed appellant readily ingest placebo methamphetamine by snorting it from a key.

[This portion of our opinion is not a quotation.]

In several ways the above evidence raised an inference of truth as to the actual drug use admitted by appellant in his July 27th confession. First, proof of appellant's deliberate consumption of substances which he thought were methamphetamine on two occasions within the time period covered in his confession established his ability and inclination to use the drug methamphetamine as he confessed. *See United States v. Melvin*, *supra* 26 MJ at 147. Second, evidence of his earlier admissions to the undercover agent confirmed the times and venue of his confessed methamphetamine use at least to an extent feasible for essentially private drug use.[2] *See State v. Harris*, *supra* 575 A.2d at 226. Third, proof of Sergeant Brainard's observations of Spencer and the latter's demonstrated capacity to produce drugs from Gigi's during the period covered in his confession established appellant's access to the drugs which he confessed to using. *United States v. Rounds*, 30 MJ at 80. Finally, the marked similarity of the essential facts asserted in appellant's spontaneous admission on July 5, 1989, and in his sub-

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[2] Appellant's admissions to the undercover agent were made subsequent to his use of real methamphetamine but contemporaneous with and prior to his use of the placebo methamphetamines. A strong argument can be made that these spontaneous admissions do not require corroboration under Mil.R.Evid. 304(g). *See United States v. Pennell*, 737 F.2d 521, 537 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985). In any event, no objection was made by appellant to use of these admissions at the suppression hearing as corroboration of his later confession. *See* Mil.R.Evid. 304(d)(2)(A).

sequently advised confession on July 27, 1989, imparted a strong ring of truth to his later statement.[3] *See generally United States v. Yeoman, supra* at 4-5. Accordingly, based on both appellant's earlier admissions to Sergeant Brainard and the other evidence noted above, we conclude that his later voluntary confession was shown to be sufficiently trustworthy for admission at his court-martial. *See generally United States v. Basile*, 771 F.2d 307, 311 n.3 (7th Cir. 1985).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

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[3] We again note that, at the suppression hearing, appellant did not object to introduction in evidence of his earlier admissions to Sergeant Brainard. *See* Mil.R.Evid. 304(c)(2) and (d)(2)(A). In view of the recent decision of *Arizona v. Fulminante*, —— U.S. ——, ———, 111 S.Ct. 1246, 1257-66, 113 L.Ed.2d 302 (1991), if such evidence was admitted at trial, any error in admission of his later confession could be considered harmless. *See* RCM 910 (a)(2), Manual, *supra*. *Cf. United States v. Wong Ching Hing*, 867 F.2d 754, 758 (2d Cir. 1989).

In Federal civilian practice it is inappropriate for a conditional guilty plea to be entered and accepted when the issue reserved for appeal will not be dispositive of an accused's case. *See United States v. Wong Ching Hing, supra. See generally* 18 USC (Rule 11(a)(2)) Federal Rule of Criminal Procedure, Notes of Advisory Committee on 1983 Amendment.

APPENDIX

Q: When you produced this placebo methamphetamine, how did you identify it to the accused?

A: I called it crank. That is what the common term is.

Q: For what?

A: Methamphetamine.

Q: So he snorted some up his nose that day on the 5th?

A: Yes ma'am.

Q: What did you do after snorting this placebo methamphetamine?

A: We continued to drive around a little bit. We had some further conversation. Then we went back to the club.

Q: I'd like to focus your attention a little bit on the conversation you had with the accused on the 5th of July. Did the accused on the 5th of July, *during this time in the car when this placebo methamphetamine was snorted, did he mention any prior uses of methamphetamine on his part?*

A: *Yes ma'am.*

Q: *How did that come up?*

A: *We were talking about jet skiing. He stated the last week, he and his roommate had snorted some methamphetamine and it kept them up through the night and into the next day. They had HFC's or HSC's that they had to conduct and they did them quickly and in a timely manner and they were given time off for it.*

Q: All right. What was an HFC or an HSC? What are you talking about?

A: I wasn't sure because I don't have a maintenance background.

Q: Did you ask the accused?

A: I talked to him about it. I asked him what it was. Basically my recollection was that it had some sort of check or inspection they conducted on an aircraft.

Q: How was his methamphetamine use supposed to be related to this aircraft check?

A: Methamphetamine is a speed. Basically what it does is hype your system up so it makes you feel like you are always ready to go. By ingesting methamphetamine it makes you feel like you can accomplish anything and everything in a relatively quick time.

Q: What did the accused tell you it did for him with regard to this aircraft check?

A: It made him feel like he was up and constantly going so that they could conduct their work in a faster manner; it made them work faster basically.

Q: So he told you he was under the influence of methamphetamine when he was working on these aircraft?

A: That is true.

Q: The result of that aircraft work was what?

A: They conducted the inspection in a timely manner and they were given time off.

Q: After the 5th of July—Before I go further, let me—*Did you discuss with the accused who he used methamphetamine with, I guess people do this together, on the 5th of July?*

A: *I did.*

Q: *How did that come about?*

A: *In the conversation Airman Maio told me that he basically used with his roommate, Airman Spencer, and that they liked to use it prior to going jet skiing on the weekends.* He didn't really particularly like partying with military people or they didn't party with military people because, allegedly, a female had been apprehended by OSI and the female came back and told them that OSI knew about them, or had their names or something, so that they were real cautious with other military people.

* * * * *

A: On the 23rd of June.

* * * * *

Q: How did he use? With a key? The same way?
A: Right. Snorting through the nose.
Q: On a key?
A: Yes ma'am.
Q: So the accused told you that he primarily used the methamphetamine with Airman Spencer. Right?
A: That is correct.
Q: Did you ever see those two use together?
A: No ma'am.
Q: On the 5th of July when he was telling you he used methamphetamine primarily with Airman Spencer and about this using methamphetamine and working on these aircraft, let me ask you this. The date that the accused supposedly got cranked up on methamphetamine and worked on this aircraft, did he tell you when that was that he got this day—he did this and got the day off?
A: No. When he told me on the 5th of July, and his words were, "the week before" so it could have been anywhere from the last few days of June until the first few days of July.
Q: And he told you he was rewarded by getting time off?
A: Comp time.
Q: Did he say how much time?
A: I believe it was just that day.
Q: After the 5th of July 1989, did you ever see the accused involved with drugs?
A: One more time.
Q: When was this?
A: I'd have to check my statement to be sure of the date. But it was towards the mid month of July, probably around the 14th I would guess.
Q: Is the 14th of July your best recollection?
A: Off of memory.

(Emphasis added.)

COX, Judge (concurring):

I agree that the military judge did not err in denying appellant's motion to suppress his confession. I write separately, however, to caution that, with respect to Charge II and its specification, this opinion should not, in my view, be extended beyond its facts.

There have long been special rules in American jurisprudence regarding corroboration of statements of the accused. *See* Comment Note, *Corroboration of extrajudicial confession or admission*, 45 ALR 2d 1316 (1956). The two leading cases are *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed 101 (1954), and *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954).

In *Opper*, the Court explained that "the better rule . . . [is] that the corroborative evidence need not be sufficient, independent of the statement, to establish the *corpus delicti*." 348 U.S. at 93, 75 S.Ct. at 164. In *Smith*, the Court ruled that a conviction may be supported by a confession "as long as there is substantial *independent evidence* that the offense has been committed." 348 U.S. at 156, 75 S.Ct. at 199 (emphasis added).

As basis for these rules, the Supreme Court explained in *Opper:*

> In the United States *our concept of justice* that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case.

348 U.S. at 89, 75 S.Ct. at 162 (emphasis added).

Over the years since *Smith* and *Opper*, courts have tended to minimize, in their verbal formulations, the degree of corroboration necessary to receive statements of an accused and to sustain convictions based thereon.

Still I know of no conviction that has been sustained in which, apart from the words of the accused, there was no evidence whatever that a crime occurred.[1] Looking beyond mere verbiage, the cases convince me that, in America, we do not allow someone to be convicted unless there is some level of *external* evidence *that a crime has occurred*, no matter how many times or ways the accused has admitted it outside a courtroom. Whether this policy is based on due process or some other constitutional value is not specified.

In contrast, the Military Rules of Evidence are established by the President according to his authority to prescribe rules of evidence for courts-martial. Art. 36(a), Uniform Code of Military Justice, 10 USC § 836(a). As reflected in the majority opinion, Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, sets forth a rule for corroboration of certain admissions and confessions. Presumably this rule, having no direct counterpart in the Federal Rules of Evidence, was intended as a sort of restatement of the general federal case law regarding corroboration of confessions and admissions.

I do not doubt that appellant's statements, both during his attempted possession and use of methamphetamine (Charge I and its specifications) and upon being interrogated later by military authorities, meet the requirements for admissibility under the Military Rules of Evidence. By its terms, however, the Mil.R.Evid. 304(g) corroboration requirement appears to be limited to those sorts of statements which require rights-warnings and waivers. *See generally* Mil.R.Evid. 304 and 305. Statements of an accused falling under any other evidentiary rule, including apparently Mil.R.Evid. 801(d)(2) ("Admission by *party-opponent*") as well as Mil.R.Evid. 803

[1] Of course, I am not including cases of perjury or the false cry of "Fire" in a crowded theater, where the words themselves are legally significant.

and 804 ("*Hearsay exceptions*"), are not assigned a corroboration requirement.

The result is that appellant's *res gestae* statements made during the attempted possession and use of methamphetamine, not apparently being the result of interrogation, would presumably be admissible simply as Mil. R.Evid. 801(d)(2) admissions by a party-opponent.[2] Further, since those admissions have no corroboration requirement themselves, they become available under Mil. R.Evid. 304(g) to serve as corroboration of appellant's later, interrogation derived confession. Thus, under the rules of evidence, both of appellant's statements appear to be admissible.

In my view, however, had this case gone to trial on the merits with the state of evidence before us, appellant's conviction of Charge II and its specification would not have been sustainable as a matter of law.[3] I reach this conclusion because, as the record now stands, there is not a scintilla of evidence that the crime in question occurred—apart from appellant's own words. Obviously, there is a distinct difference between legal sufficiency of evidence and admissibility. Therefore, my caveat is that the Military Rules of Evidence do not comprehensively circumscribe the entire body of law on the subject of corroboration of admissions and confessions. The instant facts are illustrative.

The crime in issue is *appellant's* alleged wrongful *ingestion* of *methamphetamine* on divers occasions between April 1 and July 27, 1989. *See* Art. 112a(a) and (b)(1). UCMJ, 10 USC § 912a(a) and (b)(1). Not counting

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[2] Depending on context, such an admission might also qualify as a statement against interest. Mil.R.Evid. 804(b)(3), Manual for Courts-Martial, United States, 1984.

[3] I fully recognize that this case did not go to trial on the merits, and I do not speculate as to what other information might have been adduced by way of corroboration.

appellant's statements, let us examine the cited evidence that appellant ingested such a substance.

The testimony is that, on a different, charged occasion, appellant purchased what he mistakenly thought was *methamphetamines*. On other, charged occasions, he ingested what he again mistakenly thought was *methamphetamine*. That these actions occurred may indeed show a general incliniation on appellant's part and may lend credence to his statement of broader drug use. Thus they may have relevance in a general sense. However, the fact that appellant committed crime B does not indicate that crime A *occurred* at another time and place and that appellant committed it. Not in America.

Similarly, there is evidence that appellant's *roommate* had access to purported methamphetamine and that the *roommate* ingested methamphetamine—once even in appellant's presence.[4] The inference is that appellant therefore had access to methamphetamine. Granted, access and opportunity can often be relevant, such as to identify a perpetrator of a known crime. However, a person's apparent capability to commit a crime does not indicate that a crime was in fact *committed*. Not in America.

In fact, apart from appellant's own words, there is no evidence whatever pointing to *appellant's ingestion of methamphetamine*.[5]

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[4] Admittedly, the proximity-to-drug-use aspect of *United States v. Rounds*, 30 MJ 76 (CMA), *cert. denied*, —— U.S. ——, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990), in which I concurred, is quite similar to the instant facts. In that case, however, the testimony of others regarding the circumstances of the various drug events and Rounds' intimate connection therewith lent considerably more substance to his purpose and conduct.

[5] Due to appellant's judicial admission, it is also unnecessary for us to predict whether evidence would have been introduced to corroborate the illicit nature of the substance appellant supposedly ingested. That the substance was a controlled substance is, of course, the very essence of this offense. To convict him solely on

Again, my concern is not with the Military Rules of Evidence, as far as they go. Admissiblity is one thing; legal sufficiency is another. Had the case been tried on the merits and had no external evidence been presented corroborating the occurrence of a crime, the military judge should have granted a motion for a finding of not guilty at the close of the prosecution's case. RCM 917.

Of course the case never got that far; appellant only stood his ground on the question of admissibility. As I agree that appellant's confession was admissible under the rules of evidence, the military judge obviously did not err in refusing to suppress it. With this qualification, I concur.

WISS, Judge (concurring):

As the concurring opinion of Judge Cox points out, the matter of corroborating evidence, independent of a confession or admission, actually involves two issues:

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the basis of out-of-court admissions, without any external indication of the nature of the substance, would again be tantamount to convicting him on his words alone. *See Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), and *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954). Appellant's pleas relieve us from speculating how the Government might have sustained its ultimate burden of proving the illegality of the substance beyond a reasonable doubt.

In this regard, I note this paradox: Even where questionable substance or body fluids have been seized, evaluated at laboratories, and the results published, it is still necesary to have an expert present in the courtroom to elucidate for the factfinder the wonders and mysteries of drug identification. *United States v. Reichenback*, 29 MJ 128 (CMA 1989); *United Sttaes v. Murphy*, 23 MJ 310 (CMA 1987). On the other hand, apparently any third-grade dropout who has purchased an unknown substance from an unknown source can instinctively and unerringly identify it, beyond a reasonable doubt, with at least the same degree of certitude as a rocket scientist. *See United States v. Schrock*, 855 F.2d 327 (6th Cir. 1988); *United States v. Rounds*, *supra*. Appellant is such an example, having demonstrated his prowess by buying and using *placebo*!

The quantity and quality of the independent evidence sufficient to corroboate the confession for purposes of *admissibility* of that confession; and the quantity and quality of such evidence that will be sufficient, along with the confession, to *sustain a conviction* in a contested trial. *See Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed.2d 192 (1954); *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954).

Judge Cox's views on the second question are stimulating and provoking, but that question is not in issue in this case. Accordingly, since that issue is complex and worthy of careful and focused study, I prefer to leave consideration of it for a case in which the matter is in issue.

The first issue, of course, is properly before the Court in this case, and I concur in the majority's treatment of that issue under these facts. At the same time, I think it is appropriate here to record my view that our fundamental task in this area is to examine the *probative quality* of the proffered independent evidence to see if it truly *is* "corroborative."

Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984, states that the independent evidence necessary to permit admissibility of a confession must "corroborate[] the essential facts admitted to justify sufficiently an inference of their truth." *The Random House College Dictionary, Revised Edition* at 302 (1980), defines "corroborate" as "to confirm; make more certain." The majority opinions in both *United States v. Rounds*, 30 MJ 76(CMA), *cert. denied*, —— U.S. ——, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990), and *United States v. Melvin*, 26 MJ 145 (CMA 1988), illustrate situations in which—though the independent evidence was not sufficient alone, to prove the charged misconduct beyond a reasonable doubt—the independent evidence *did* "confirm" and "make more certain" the truth of the confession's reliability.

The separate opinion of then-Chief Judge Everett in *Rounds* contains a good discussion (30 MJ at 83-84) of what I perceive to be this search for trustworthiness of a confesison by *probative* independent evidence—evidence which, because of *what* it corroborates, will lead one to conclude logically that the whole confession is true. While the *quantity* of the independent evidence need only be "slight" (*id.* at 83) to permit admission of the confession, the *quality* of that evidence is the more critical focus as to the confession's reliability and, thus, admissibility.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

AIRMAN FIRST CLASS CARMEN M. MAIO, JR.,
FR 079-68-7180
UNITED STATES AIR FORCE

ACM 28458

10 JANUARY 1991

Sentence adjudged 19 January 1990 by GCM convened at Travis Air Force Base, California. Military Judge: Michael A. Kilroy (sitting alone).

Approved sentence: Bad conduct discharge, confinement for nine (9) months, forfeiture of four hundred dollars ($400.00) pay per month for nine (9) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Bernard E. Doyle, Jr. Appellate Counsel for the United States: Colonel Robert E. Giovagnoni; Major Paul H. Blackwell, Jr.; Captain David G. Nix and Lieutenant Colonel Joseph J. Urban, USAFR.

Before

LEONARD, RIVES and MCLAUTHLIN
Appellate Military Judge

OPINION OF THE COURT

McLAUTHLIN, Judge:

Pursuant to his guilty pleas, Airman First Class Carmen M. Maio was convicted of attempted use and possession of methamphetamines. Following conditional guilty pleas, he was also convicted of using methampnetamines. He asserts the preserved issue and another error on appeal. We find neither persuasive and affirm.

I

In his preserved issue, Maio argues that his confessed use of methamphetamines with his roommate was not adequately corroborated. We disagree. The independent evidence necessary to establish corroboration "need raise only an inference of the truth of the essential facts admitted." Mil. R. Evid. 304(g)(1).

Maio confessed to using "crank [methamphetamines] approximately ten to twelve times." He said he inhaled the drug in powder form, knowing what it was "from its distinct smell and it would make me feel like I had drank [sic] a pot of coffee." He told the investigator he usually obtained the drug through his roommate who got it "from "civilians" at Gigi's, a local night club. On one occasion, Maio said he purchased what he thought was "crank" from a civilian he met at Gigi's. However, after using about half of what he bought, Maio said he realized it was not "crank," so he quit using the substance in the bag. He told the investigator he kept what was left.

Unfortunately for Maio, the civilian he met at Gigi's was an undercover agent. The agent testified that he sold Maio a plastic bag with a white powder placebo made to look like methamphetamines on 14 July 1989. After the sale, the agent said he saw Maio "snort some of the placebo crank." A half-emputy plastic bag of white powder matching the agent's description was found in a search of Maio's room on 27 July 1989. A test of the powder re-

vealed it did not contain methamphetamines. The agent said Maio told him about a time he and his roommate "snorted some methamphetamine" which enabled them to perform an aircraft inspection quickly and resulted in their receiving some time off. A supervisor verified that Maio had been given time off for performing an aircraft inspection in less than the alloted time with no errors.

The agent also described his separate investigation of Maio's roommate. The agent said he met Maio's roommate at Gigi's and that Maio's roommate supplied him with a white powder form of methamphetamines. The agent noted that Maio's roommate used the drug the same way Maio had "used" the placebo, by inhaling it off a key.

There were no eye-witnesses to Maio's confessed use of methamphetamines with his roommate. Nevertheless, in the hearing on Maio's motion to suppress, the government produced independent evidence confirming:

1) Maio's roommate frequented an off-base night club where he had access to methamphetamines;

2) Maio's roommate supplied others with a white powder form of methamphetamines;

3) Maio and his roommate used what they thought were methamphetamines exactly the same way, by inhaling it off a key;

4) Maio was familiar with the drugs and its effects, to the extent that he could tell what he got from the undercover agent was not "crank";

5) Maio did not use all the placebo drug provided by the agent, and investigators found the remainder in his room where Maio said it would be.

6) Maio received time off for good work he attributed to enhanced performance caused by using methamphetamines with his roommate.

Each of these independent factors dovetailed with the times, places, and persons mentioned in Maio's admission.

More importantly, the government's corroborating evidence showed that Maio had both the access and opportunity to inject the drug he admitted using. That is enough. *See United States v. Rounds*, 30 M.J. 76, 80 (C.M.A. 1990); *United States v. Melvin*, 26 M.J. 145, 147 (C.M.A. 1988).

II

Appellant also asserts he was denied a full opportunity to exercise his rights to counsel because the military judge failed to ask whether he wished to be represented by his trial defense counsel. After a full explanation of his counsel rights, however, Maio had no questions. He made no objection to his trial defense counsel and never requested another attorney. Maio was fully and adequately represented. We find no prejudice.

III

Having examined the record of trial, the assignments of error, and the government's reply, we conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge LEONARD and Judge RIVES concur.

[SEAL]

OFFICIAL:

/s/ Pamela D. Stevenson
PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

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